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No. 835

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF SCRANTON AND MILTON J. SHAPP, *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the Southern District of New York

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REPLY TO MOTIONS TO AFFIRM

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STATEMENT

Appellants City of Scranton and Milton J. Shapp request that the Court deny the various motions to affirm[1] their dismissal with prejudice in the lower court's Penn-Central

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[1] Submitted by I.C.C.-U.S., PRR-NYC, New Haven Railroad, D&H, State of New York, Commonwealth of Pennsylvania, and jointly by States of Connecticut, Massachusetts and Rhode Island.

case. The underlying thrust of the appellee motions is that meaningful judicial review of the basic validity of the Penn-Central and N&W Inclusion orders of the I.C.C. should be hastily by-passed in the rush to find a "haven" for the New Haven.

Scranton and Shapp were dismissed with prejudice by the court below in the Penn-Central action because they declined to attack Penn-Central and N&W Inclusion in separate proceedings. The two orders were conceded by the U.S. and I.C.C. to be "wholly interrelated," "completely intertwined" and "inextricably intertwined."[2] Contrary to the assertions of U.S.-I.C.C., Scranton and Shapp did not seek to transfer their Penn-Central action to another district court,[3] to avoid a final hearing on the merits of their case in the court below,[4] or to avoid a forum that had expressed an unfavorable opinion as to the merits of their position.[5] Scranton and Shapp had informed the court below on several occasions that their case could only be heard properly on a combined pleading, briefing and hearing schedule embracing both I.C.C. orders. This was not done.

It was I.C.C.-U.S. and PRR-NYC, later joined by other railroads, that insisted upon separate judicial review for Penn-Central and for N&W Inclusion, although the two

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[2] I.C.C.-U.S. Memorandum in Support of Motion for Injunction, filed July 20, 1967 in the court below.

[3] I.C.C.-U.S. Motion to Affirm, p. 16. Transfer could not be had in any event. *New York Central R.R.* v. *United States*, 200 F. Supp. 944 (S.D.N.Y. 1961).

[4] PRR-NYC Motion to Affirm, p. 2.

[5] PRR-NYC Motion to Affirm, p. 9.

I.C.C. orders are wholly interrelated, completely intertwined and inextricably intertwined. These parties went to great lengths to preclude Scranton and Shapp from attacking Penn-Central and N&W Inclusion in a consolidated action in any court,[6] and secured a stay of proceedings despite the mandate of this Court for expedition in all matters arising out of the Penn-Central and N&W Inclusion orders.[7]

Judicial review of Penn-Central and N&W Inclusion in a consolidated action is entirely different from separate actions, as below, even though in a single court. It is not a mere "housekeeping detail" as suggested by PRR and NYC.[8] A consolidated action permits the full impact of the required inclusion (N&W Inclusion) to be considered in evaluating whether the order making necessary the inclusion (Penn-Central) should be set aside. On the other hand, the "domino" theory of the lower court, whereby Penn-Central is heard first, then N&W Inclusion, followed by whether Penn-Central should be further enjoined, is a

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[6] The PRR-NYC contention that appellants' present position on consolidation is dictated by exigency rather than conviction, based upon a reply to Reading filed May 9, 1967 by Scranton with the I.C.C. involving a general consolidation in the Eastern District without further hearings (PRR-NYC Motion, p. 11), disregards the fact that it was generally understood that the I.C.C. would consolidate Penn-Central and N&W Inclusion for decision. At least this is the way matters looked in the immediate period subsequent to the March 27, 1967 decision of this Court in *B. & O. R. Co.* v. *United States.* Scranton filed its own petition on May 9, 1967 requesting further hearings in all pending Eastern railroad unification proceedings and stated no objection to consolidation on that basis. That petition has been reproduced as an appendix to plaintiffs' brief in the *Moosic* case which was filed November 29, 1967.

[7] 386 U.S. at 392 (1967).

[8] PRR-NYC Motion, p. 10.

prejudicial method of dealing with two wholly interrelated, completely intertwined and inextricably intertwined actions.

Never having been parties to the lower court's N&W Inclusion action, Scranton and Shapp participated in the combined action attacking that order and the Penn-Central order which Borough of Moosic instituted in the Middle District of Pennsylvania. That action is presently scheduled for final hearing on December 15, 1967.

UNDERLYING NECESSITY FOR PROPER JUDICIAL REVIEW

Procedural aspects of this case are not to be glossed over. "Experience teaches, however, that the affording of procedural safeguards which by their nature serve to illuminate the underlying facts, in itself, often operates to prevent erroneous decisions on the merits from occurring." (*Silver* v. *New York Stock Exchange*, 373 U.S. 341, 366 (1963))

This Court found it necessary heretofore to reverse the denial of an interlocutory injunction by the statutory court because the record showed a finding by the I.C.C. for the need of interim protection of certain railroads, and yet the I.C.C. had permitted consummation of the merger without such protection.

Neither this Court nor the statutory court in dealing with the denial of the interlocutory injunction itself claimed to have passed upon the merits. In the subsequent action of

the statutory court, its only attention to any of the merits was by way of what it considered a gratuitous footnote.[9]

This court, sitting as a court of review, has not had the basic benefit of a real determination by the court below on the merits of the controversy. This court should not permit by default the consummation of the most monopolistic amalgamation of competing systems in the economic history of the United States.

A final hearing on the merits of the two admittedly inextricably intertwined orders is presently listed before the statutory court in Pennsylvania. A determination by that court accompanied by findings of fact and conclusions of law will allow for appropriate judicial review. The wild cry for immediate relief to benefit the New Haven system should not debar procedural safeguards which experience teaches is a necessary concommitant of appropriate judicial review.

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[9] The lengthy PRR-NYC motion to affirm the dismissal of Scranton and Shapp with prejudice is largely devoted to a footnote in the opinion of the court below. The footnote (No. 778, J.S., B-9, fn. 6) purports to rule that appellants' attacks on Penn-Central simply represent disagreement with procedural and policy determinations which Congress has committed to the Commission. PRR and NYC now urge that this Court go beyond the footnote and review the merits of Penn-Central based upon briefs filed in September, 1966 via a summary judgment proceeding in this Court. (PRR-NYC Motion, pp. 11-24) PRR and NYC have such a motion for summary judgment pending in the district court at Scranton, Pa. N&W Inclusion was not even the subject of a recommended report in September, 1966.

CONCLUSION

For the foregoing reasons, the motions to affirm should be denied, and this court should make any necessary orders as will insure that the public interest be heard in some district court.

Respectfully submitted,

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Dated: November 30, 1967

APPENDIX

CHRONOLOGY OF PRINCIPAL EVENTS SINCE JUNE 12, 1967 SPECIAL RELEASE OF I.C.C. ORDERS

	Action
12, 1967	I.C.C. releases PRR-NYC and N&W Inclusion reports.
13, 1967	N&W files action against N&W Inclusion in U.S.D.C.-W.D. Va.
16, 1967	U.S.-I.C.C. and railroads meet in chamber with S.D.N.Y. judges. Court agrees to entertain motions and sets hearing.
23, 1967	D&H attacks terms of N&W Inclusion in S.D.N.Y.
26, 1967	Moosic files consolidated action against PRR-NYC and N&W Inclusion in M.D. Pa.
27, 1967	Response to S.D.N.Y. Show cause orders filed.
28, 1967	S.D.N.Y. Hearing on motions to require Scranton and Shapp to supplement complaints.
3, 1967	Hearing set for July 7, 1967 by M.D. Pa. on Moosic request for injunction of both I.C.C. orders.
3, 1967	S.D.N.Y. enjoins PRR-NYC. Sets July 17, 1967 for Supp. complaints; August 8 for briefs and September 18 for hearing in PRR-NYC.
7, 1967	Hearing in M.D. Pa. on I.C.C.-U.S. and PRR-NYC motions for stay. I.C.C. postpones effective date for N&W Inclusion.
0, 1967	Hearing in W.D. Va. on I.C.C.-U.S. motion for stay.
1, 1967	M.D. Pa. grants stay of all proceedings until October 1, 1967 or further order of court.
4, 1967	W.D. Va. sets briefing schedule for N&W Inclusion; Reserves issue of stay for late September.
7, 1967	M.D. Pa. grants show cause order for filing Moosic briefs in M.D. Pa. based upon W.D. Va. action.

July 17, 1967	Scranton and Shapp move S.D.N.Y. for leave withdraw from PRR-NYC.
July 20, 1967	I.C.C.-U.S. move S.D.N.Y. to (1) enjoin Scr ton, Shapp and N&W from participation in M. Pa. and W.D. Va.; (2) Join N&W as involunt plaintiff to D&H's N&W Inclusion action; and (to establish separate pleading and briefing sch ule in N&W Inclusion identical with W.D. Va.
July 25, 1967	S.D.N.Y. hearing on I.C.C.-U.S. motions a Scranton, Shapp request to withdraw.
July 26, 1967	Rulings on motions. Scranton-Shapp given un August 2 to file supplemental complaints in PR NYC and to file briefs on August 8. Schedu establishing for N&W Inclusion to begin af release of I.C.C. report on reconsideration N&W Inclusion.
July 28, 1967	M.D. Pa. denies motion to vacate stay.
August 2, 1967	Scranton and Shapp file statement of objectio to S.D.N.Y. order in PRR-NYC.
August 7, 1967	Moosic case plaintiffs request stay be vacat based upon railroad briefs in S.D.N.Y.
August 14, 1967	I.C.C. issues report on reconsideration in N& Inclusion. N&W Inclusion pleading and briefi schedule commence in S.D.N.Y. and W.D. Va.
August 30, 1967	M.D. Pa. denies Moosic plaintiffs motion to v cate stay.
September 18, 1967	S.D.N.Y. hears PRR-NYC.
September 28, 1967	S.D.N.Y. hears N&W Inclusion.
October 19, 1967	S.D.N.Y. decision released.
November 9, 1967	U.S. Supreme Court stays consummation of PR NYC.
November 9, 1967	M.D. Pa. orders briefing and hearing schedule o permanent injunction of PRR-NYC and N& Inclusion.